No. 80-1026

In The

Supreme Court of the United States

October Term, 1980

CHRYSLER CORPORATION,

Petitioner,

vs.

RICHARD F. DAWSON and DIANA DAWSON, individually and DIANA DAWSON as parent and natural Guardian of BRYAN DAWSON, a minor,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUR REBUTTAL BRIEF IN OPPOSITION TO REPLY BRIEF

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The lower courts specifically held that petitioner waived any argument with respect to compliance with federal standards.

Rule 22 of the Rules of the Supreme Court of the United States provides for supplemental briefs dealing with new cases or legislation or other intervening matters not available at the time

of the party's last filing. While the majority of the petitioner's Reply Brief simply restates its prior position which does not constitute intervening matter, petitioner's Reply Brief abuses the record. At page 5 of its Reply Brief, petitioner states:

> "Contrary to respondents' assertion, neither the District Court nor the Court of Appeals ruled that petitioner 'waived' its argument that respondents failed to prove their proposed alternative design would comply with mandatory Federal Motor Vehicle Safety Standards. In fact, this issue was properly raised in the District Court."

This is untrue. Chrysler never raised the question of compliance of respondent's alternative design during trial. There was no direct evidence or cross-examination on it. Chrysler did not raise the issue in its motion for a directed verdict. Chrysler did not submit a single point for charge on compliance with federal standards or take exception to the charge of the court for failure to include it. The first time Chrysler raised this argument was in its post-trial motions. The District Court, in response to this argument, held that Chrysler had waived it.

> "Defendant, during trial, failed to cross examine on this issue, nor did it introduce any evidence to demonstrate noncompliance. *It is too late for defendant to raise this argument.* The Court finds nothing in Cepeda to indicate that plaintiff's burden of production extends to this issue even *where a defendant does not raise it during trial.*" (Emphasis added.) (Opinion of District Court, 4a, Respondent's Brief.)

> "Chrysler also contends that the Court should

> have told the jury that an alternate design should have complied with Federal standards. This is proper jury argument, but there is no law compelling its inclusion in the charge. *Furthermore, defendant did not timely state an objection on this ground.* Federal Rules of Civil Procedure 51." (Emphasis added.) (Opinion of the District Court, 11a, 12a, Respondent's Brief.)

Rule 51, Federal Rules of Civil Procedure provides:

> "Rule 51. Instructions to Jury: Objection.
>
> After the close of the evidence or at such earlier time during the trial as the court reasonable directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

The Third Circuit, in response to Chrysler's argument re an affirmative burden of proof, noted that there was no suggestion at trial that the alternative design did not comply with Federal Safety Standards (Petitioner's Brief, 16a).

Petitioner points to no testimony or record evidence where it raised this issue. Additionally, it cannot cite a federal

regulation which the alternative design (which is merely the addition of a cross-member to a Ford frame) purportedly violates. Chrysler made a conscious decision not to bring this issue to the attention of the trial court. Basic fairness and the Federal Rules of Civil Procedure preclude raising the issue on appeal.

CONCLUSION

In its Reply Brief, Chrysler narrows the essence of its petition to a request for this Court to set an additional affirmative burden of proof in a common law products liability suit. This issue was never properly raised in the lower court and accordingly may not be considered on appeal.

Respectfully submitted,

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